PUBLIC PROSECUTOR

v.

PETER TING CHIONG KING

HIGH COURT BORNEO, SIBU
CHONG SIEW FAI J
[CRIMINAL APPEAL NO. 23 OF 1982]
10 NOVEMBER 1984

CRIMINAL LAW AND PROCEDURE: *Appeal by prosecution against sentence of whipping imposed on appellant being made concurrent with the whipping sentence passed in another case also involving appellant - Whether a sentence of whipping cannot be made concurrent - Whether concurrent sentences of whipping authorised by law.*

This was an appeal by the prosecution against the sentence of whipping imposed on the appellant being made concurrent with the whipping sentence passed in another case also involving the appellant.

The complaint of the learned Deputy Public Prosecutor was that a sentence of whipping cannot be made concurrent and that it was wrong to so order.

Held:

[1] To order concurrent sentences of whipping as understood in the light of the authorities cited is to impose a heavier punishment through a mode of execution not legally provided. In any event, it was, in the Court's view, unauthorised by law.

[2] In the particular circumstances of this case, the Court considered it fair and reasonable that the sentence of whipping be reduced by 3 strokes, i.e. from 5 strokes to 2 strokes. And it so ordered. However, the sentence of 5 years' imprisonment was to remain.

[Order accordingly.]

Cases referred to:
Emperor v. Veerappa [1937] AIR Rangoon 310
Emperor v. Yenkataswamy [1937] AIR Rangoon 286

Legislation referred to:
Criminal Procedure Code, ss. 282(d), 292(i)

For the appellant - Nik Hashim bin Abdul Rahman, DPP
For the respondent - in person

JUDGMENT

Chong Siew Fai J:

This is an appeal by the prosecution against the sentence of whipping imposed on the appellant being made concurrent with the whipping sentence passed in another case also involving the appellant.

So far as is relevant to the instant appeal, the facts are briefly as follows. In Sibu Sessions Court Criminal Case No. 16/82 the appellant was convicted on his own plea of guilty of the offence of robbery by using a deadly weapon, a dagger, and was sentenced, *inter alia*, to 5 strokes of the rattan. In another Criminal Case No. 17/82 arising from which the present

appeal is brought, the appellant was again convicted of another offence of the same nature on his own plea of guilty and was sentenced, *inter alia*, to 5 strokes of the rattan. This is what the learned trial President said in his judgment:

> The offender is sentenced to five (5) years' imprisonment and with 5 strokes of the rattan. The sentence is to take effect from today. The substantive sentence (imprisonment) can be concurrent and there is no reason why additional sentence (whipping) cannot be concurrent (See e.g. s. 282(d) and s. 292(i) CPC). Such sentence is legal and that is all that matters. A good and practical canon of construction is that where, as here, there is an ambiguity or doubt, such ambiguity or doubt should, as here, be resolved in favour of the accused, until Parliament expressly says otherwise.

It may be noted that the above judgment contains no express and identifiable order that the sentence of whipping is to be concurrent with that imposed in Criminal Case No. 16/2 though this was apparently accepted by the prosecution to be the position. However, that the learned trial President intended the sentences of whipping in those two cases to be concurrent is obvious from his remark in Criminal Case No. 18/82 in which the appellant is also the accused. In Case No. 18/82, the appellant was convicted of the offence of voluntarily causing hurt while committing robbery and was sentenced to 5 years' imprisonment. With an obvious reference to Case No. 17/82, the learned trial President said in his judgment:

> The DPP said the rattan can't be concurrent. It is concurrent. (See Case 17/82).

The complaint of the learned Deputy Public Prosecutor is that a sentence of whipping cannot be made concurrent and that it was wrong to so order. I have not been able to find any cases decided by Court in our country on this issue. However, in *Emperor v. Veerappa* [1937] AIR Rangoon 310 the accused was convicted of two offences in two separate cases. For each offence he was sentenced to 20 lashes, but the two sentences of whipping were ordered to run concurrently. The judgment at page 311 reads:

> ... and the position is not better if they (double sentences of whipping) are ordered to run concurrently because sentences of whipping cannot run concurrently.
>
> As pointed out by Twomey J in 6 LBR 22 (*Emperor v. Eng Gyaung* 12 Cr. LJ 465) the word "concurrent" properly applies only to sentences of imprisonment. If it were applied to sentences of whipping the literal meaning would be that the prisoner was to be flogged by two operators simultaneously.

See also *Emperor v. Yenkataswamy* [1937] AIR Rangoon 286 where the same Judge again expressed the same view. I am inclined to agree with the construction on the concurrent sentences of whipping in those cases.

More recent Indian or English authorities on the issue appear to be lacking. This, however, may not be surprising since the sentence or whipping was abolished in England in 1948 and in India in 1955.

The learned trial President said in his judgment that the substantive sentence (imprisonment) could be concurrent and there was no reason why the additional sentence (whipping) could not be concurrent. He referred to s. 282(d) and s. 292(i) of the Criminal Procedure Code. Section 292(i) allows a second sentence of imprisonment imposed in a subsequent trial of an offence to run either immediately or at the expiration of the imprisonment term imposed in an early trial of the same accused on another offence as the Court may direct. It has no application to sentences of whipping. Similarly, s. 282(d) of the Criminal Procedure Code deals with sentences of imprisonment and not sentence of whipping.

To order concurrent sentences of whipping as understood in the light of the authorities cited above is to impose a heavier punishment through a mode of execution not legally provided. In any event, it is, in my view, unauthorised by law.

For the above reasons the order of concurrent execution of the 5 strokes of the rattan together with those ordered in Case No. 16/82 is set aside.

The learned trial President considered it fit that the sentence of whipping should be imposed. I do not propose to interfere with that. However, it is difficult to assess how many strokes would have been imposed had the concurrent order not been erroneously made. It seems, from the judgment of the learned trial President, that he did not intend that 5 strokes of the rattan were to be separately and physically inflicted in this Case No. 17/82 in addition to the 5 strokes ordered in Case No. 16/82. Indeed, it might be argued that in all no more than 5 strokes were, in effect, intended to be physically inflicted for both cases. In the particular circumstances of this case, I consider it fair and reasonable that the sentence of whipping be reduced by 3 strokes i.e. from 5 strokes to 2 strokes. And I so order. The sentence of 5 years' imprisonment running from 2 August 1982 is, of course, to remain.

Also found at [1986] 2 CLJ 167